U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 09Apr2002

CASE No.: 2000-INA-132

In the Matter of:

ACS MANAGEMENT SYSTEMS, INC.,
Employer

On Behalf of:

OLEG KAGAN
Alien

Appearance: Michael L. Leavitt, Esquire
For the Employer

Certifying Officer: Delores DeHaan
New York, New York

Before: Burke, Chapman, and Vittone
Administrative Law Judges

LINDA S. CHAPMAN
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Oleg Kagan ("Alien") filed by ACS Management Systems, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that (1) there are not sufficient

workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 22, 1996, the Employer filed an application for labor certification to enable the Alien to fill the position of "Computer Programmer." (AF 10-11). The job duties for the position, as stated on the application, were as follows:

> Plans, develops and tests computer programs based on users request for new or modified programs applicable to user's business needs.

(AF 11). The stated requirements for the position were a bachelor's degree in engineering, and two years experience in the job offered. The rate of pay was $30,000 a year, for a forty hour week. (AF 11). The Employer was subsequently notified that additional information was needed, including a complete description of the job, to include a statement of programs used. The Employer was also notified that the prevailing wage was $64,563.20 a year. (AF 15-17). On March 10, 1999, the Employer submitted amended Forms ETA 750A and B, changing the rate of pay to $64,563.20, and adding "use of COB OL, COBOL II, CICS, USAM" to the job description. (AF 22-23).

In a Notice of Findings ("NOF") issued on April 18, 2001, the CO proposed to deny certification on the grounds that the Employer had unlawfully rejected eight qualified U.S. applicants, in violation of §§ 656.20(c)(8) and 656.21(b)(6). (AF 63-65). The CO noted the credentials and experience of these eight U.S. applicants, as well as the information provided by the Employer in its recruitment report, stating that no information was submitted by the Employer to establish that it had contacted these applicants. Although the recruitment report indicated that the Employer tried to contact each of these applicants by mail or telephone, the CO stated that the Employer must provide proof of contact, including itemized telephone bills, and if Employer was unable to contact the applicants by telephone, certified mail receipts and signed certified return cards.

The CO also instructed the Employer that, if the applicants were rejected based on an interview, it should further document the lawful job-related reasons for rejection; or, if they were rejected on the basis of their resume, specify why they were rejected without an interview.

The Employer submitted its rebuttal on May 23, 2001. (AF 66-67). The Employer responded that he had telephoned applicant Vlad Karol three times without success, and sent him a letter by regular mail. The Employer stated that he had no record of these calls, as they were local, but did not indicate that he had made any attempts to obtain records from the telephone company. Nor did the Employer provide a copy of the letter allegedly sent to Mr. Karol. With respect to applicant Sivi Chulyakov, the Employer repeated his statements on the recruitment report, that Mr. Chulyakov refused to provide references or verification of prior employment, but the Employer provided no further information to document the telephone contact. The Employer stated that applicant Edward Ratte's telephone number was disconnected, and he was unaware that the area code had changed. Although the Employer claimed that he sent Mr. Ratte a letter, he did not provide a copy of this letter.

The Employer repeated his statements in the recruitment report, that applicant Merryl Levy was willing to work only in Central and South New Jersey, but did not provide any further information documenting a contact with Merryl Levy. The Employer claimed that applicant Kenneth Gordon was actually interviewed, but was not technically qualified. The Employer did not further document the telephone contact on the recruitment report, or indicate whether the interview took place then, or at a later time, or whether it was in person.

Although the Employer represented in his recruitment report that it rejected applicant Tamara Tchiguer because she refused to give references, and had no verifiable experience, and applicant Lilian Milman because she had poor English, in rebuttal the Employer claimed that both of them had represented that they worked as programmers at Bear Stearns; when the Employer contacted Bear Stearns, he found that this reference was false. The Employer also claimed that both of these applicants either lacked technical knowledge, or the language skills to demonstrate their technical knowledge.

Finally, the Employer indicated that he rejected applicant Leonid Shapiro because he either lacked communication skills, or he never worked as a programmer.

The CO found the rebuttal unpersuasive and issued a Final Determination, dated May 30, 2001, denying certification on the grounds that the Employer had not provided sufficient information to determine if the rejection of the U.S. applicants was lawful. (AF 68-69). The CO again stated that the eight U.S. applicants were qualified, and that the Employer had failed to provide any proof that he contacted these applicants. Because the Employer presented no evidence that he contacted and interviewed qualified U.S. workers, there was no way to know if they were rejected for lawful job-related reasons. (AF 3-4). On July 6, 2001, the Employer appealed the Final Determination. (AF 70). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals.

Discussion

Pursuant to 20 C.F.R. 656.21(b)(6), an employer is required to document that if U.S. workers applied for the job opportunity, they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. An employer must take reasonable steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants. An employer bears the burden of documenting its pre-filing recruitment efforts.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. 656.1.

Accordingly, an employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991)(en banc). Moreover, the Board has repeatedly held that reasonable efforts to contact qualified U.S. applicants may, in some circumstances, require more than a single type of attempted contact. *See Jerry's Bagels*, 1993-INA-461 (Jun. 13, 1994) (employer failed to follow up unsuccessful telephone contact made to applicant with a letter); *L.G. Manufacturing, Inc.*, 1990-INA-586 (Feb. 5, 1992) (attempted contact by telephone three times but failed to mail any interview letters); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991) (should have attempted mail promptly after phone calls were unsuccessful).

In this case, the CO specifically instructed the Employer to provide documentation of its attempts to contact the eight listed applicants, either through itemized telephone records, or if attempts to contact the applicants by telephone were unsuccessful, by certified mail receipts and return cards documenting attempts to contact the applicants by mail.

The Employer did nothing to documents its attempts to contact these eight applicants. The Employer's rebuttal suggests that Mr. Sapozhnicov, Employer's president, made some of the telephone calls, as reflected on the recruitment report, but it is not clear if he made all of them. There is no indication of exactly how long each call lasted, although the information on the recruitment report reflects that all of the calls were made late in the evening on a Thursday, Friday, and Saturday, with most of them lasting no more than ten minutes.[1] No information was provided as to what was said to

---

1 In addition, although the letter forwarding the resumes is dated April 21, 1999, the Employer did not make these telephone calls until May 6, 7, and 8, 1999.

the applicants who were contacted by telephone. Indeed, it is not clear, nor did the Employer attempt to clarify, whether he actually spoke to the six applicants other than Mr. Karol and Mr. Ratte. Nor did the Employer clarify, as requested by the NOF, which applicants were rejected based solely on their resume, and why, or which applicants were rejected on the basis of the brief telephone contact. The Employer indicated that he "interviewed" Mr. Shapiro and Mr. Gordon, but if so, it apparently was by telephone, and the recruitment report reflects that Mr. Gordon's "interview" lasted no more than ten minutes. Finally, the Employer did not provide a copy of the letter it allegedly sent to Mr. Korol and Mr. Ratte.[2]

In short, the Employer did nothing to document its attempts to contact these eight applicants. It is the Employer's burden to establish that these eight U.S. applicants were rejected solely for lawful, job-related reasons. As the Employer provided insufficient information as to the substance or nature of the Employer's contacts with these applicants, there is no way to determine if they were rejected for lawful job-related reasons, and the CO was correct in denying certification.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

A
LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

---

2 While there is no requirement that an employer send letters to applicants by certified mail, return receipt requested, as suggested by the CO, doing so provides persuasive documentation of an employer's good faith effort to contact U.S. applicants. *M.N. Auto Electric Corp.*, 2000-INA-165 (BALCA August 8, 2001)(*en banc*).

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.